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Equality and Private Choice

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Equality and Private Choice:

Reproductive Laws for the 1990s. Edited by Nadine Taub* and Sherrill Cohen** (Humana Press 1989).

Reviewed by Anita L. Allen***

Introduction

Reproductive Laws for the 1990s is a collection of essays, position papers, and commentaries about the future of American law relating to women and reproduction. Aimed at policy-makers and scholars, this book surveys a range of reproductive concerns from feminist, mainstream and minority perspectives. Patient readers — the book is nearly 500 pages long — are thus rewarded with an overview of the realities and aspirations of contemporary public policy relating to pregnancy and childbirth. A three-year collaborative effort, *Reproductive Laws for the 1990s* is the product of the Project on Reproductive Laws for the 1990s (the Project). The focus of the Project was twofold. First, it examined how society ought best to respond to “questions raised by reported advances in reproductive and neonatal technology and new modes of reproduction.” Second, it considered how society can ensure that those shaping reproductive law and policy appreciate the “ramifications of these developments for gender equality.”¹

The Project’s Working Group consisted of twenty-five activists, physicians, lawyers and social scientists from around the country with a common commitment to reproductive freedom and gender equality. Position papers prepared by members of the Working Group form the core of this book. Their papers address six areas of particular current

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1. REPRODUCTIVE LAWS FOR THE 1990s v (N. Taub & S. Cohen eds. 1989) [hereinafter REPRODUCTIVE LAWS].

concern: (1) time limits on abortion; (2) prenatal screening; (3) the fetus as a person; (4) reproductive hazards in the workplace; (5) interference with reproductive choice; and, (6) alternative modes of reproduction.²

The position papers, which contain concrete policy and legislative proposals, are accompanied by the critical commentaries of outside experts. Not all of the commentators share the Working Group's view of the best reproductive policies and policy implementation strategies. To relate the Working Group's concerns to the experiences of poor, minority and disabled women, two background essays were commissioned. Among the book's most refreshing and informative contributions, these essays explain that full reproductive freedom for all women requires fundamental economic and attitudinal changes in American society.

Too many pages would be required to assess all of the facts, arguments and legislative materials amassed in this book. I have settled for a review of some of the major policy perspectives set out in the background essays and seven position papers, preceded by a general characterization of the book's overall point of view.

I. The Point of View

The editors' preface and an introductory chapter announce a feminist point of view that also serves as the book's refrain: full reproductive freedom, conceived as the ability to determine if, when, and how they will bear children, is women's key to social, economic and political equality.³ The position papers persuasively argue what is commonly ignored but seldom denied, namely, that reproductive privacy for women is circumscribed by economic conditions, by the health care delivery system, by legal norms, and by attitudes about gender, race and disability.⁴ More controversial than the Working Group members' attempts to situate reproductive decision-making in its social contexts, are their perspectives on what steps private and governmental actors may legitimately take to effectuate or constrain women's autonomous reproductive choices.

The position papers have a point of view that is deeply egalitarian, as well as feminist. Social, including economic, equality is offered as part of a policy-objective trio that also includes the more distinctly

2. *Id.* at 4.

3. *Id.* at 5.

4. *Id.* at 6.

feminist goals of reproductive freedom and gender equality. Rather than on the concept of equality's ideal articulation and philosophical defense, this work focuses on the practical implementation of roughed-out notions of equality. Detailed theories of social and gender equality are absent. The position papers are noncommittal on the currently debated questions of sexual equality, gender and "difference," such as whether sex and gender can be meaningfully distinguished, whether laws should be premised on an assumption that men and women are different, and whether women can insist upon both sexual difference and sexual equality.

Notwithstanding the absence of sustained theoretical analysis, it is usually plain enough from these papers what their authors believe is most consistent with female equality. In particular, it is plain that they support reallocation of social resources through publicly-funded programs designed to make reproductive choice meaningful for all. Concern for the impact of alternative allocations of social resources on traditionally disadvantaged groups is rarely out of view in the volume's major papers and essays. As a means to achieving the paramount ends of social equality, gender parity and reproductive freedom, the Working Group advocated a national health plan and broad, democratic access to the best medical care.⁵ While *Reproductive Laws for the 1990s* proposed these and other general solutions to the problems of inequality and ineffective choice, its editors conceded that the Working Group "identified more agonizing questions than clear-cut solutions."⁶

The book's selection of contributing policy-makers is in harmony with its otherwise egalitarian tone. For example, New York State Attorney General Robert Abrams offers brief commentary describing his state's efforts to protect women's reproductive choices by limiting regulatory interference and providing public funding for a wide array of reproductive services. Some contributors are openly critical of the Reagan Administration and the conservative political forces that oppose, for example, national health insurance and public funding for elective abortions. Not the least of these is George Miller, the Democratic Chairman of the House Select Committee on Children, Youth and Families.

In a chapter entitled, "Reproduction and Access to Health Care: A Legislator's View," Congressman Miller argues for preventive intervention as a budget savings mechanism in an era of deficit reduction.

5. *Id.* at 10.

6. *Id.* at 10.

But Miller's apparent concern is not limited to the national budget. He decries what he characterizes as the avoidable tragedy that "we have not established a *legal* right to a healthy baby, to adequate nutrition, or to proper health care."⁷ Mr. Miller blames the Reagan Administration for having proposed cuts on health services programs for the poor, and for obstructing legislative efforts to eliminate reproductive hazards in the workplace. Describing the response of the political structure to reproductive needs as "ignorant," "malicious" and requiring change,⁸ Miller calls for a national commitment to provide a guarantee of full access to quality reproductive health care in the next five years.

Reproductive Laws for the 1990s largely consists of papers written by feminists from a liberal perspective. These papers are not written "in a different voice." That is, the contributors seldom appeal explicitly to affiliative and caretaking values Carol Gilligan associates with women's moral sensibilities.⁹ Reproductive policy choices are not depicted as a working out of competing contextual responsibilities. Instead, in the language of individual rights and justice, and for the sake of autonomy and control, they stress the "trade-off between maximizing individual reproductive autonomy and allocating societal resources in an equitable way."¹⁰ Thus, this book emphasizes the ideal of effective, autonomous, non-governmental choice and, in that complex sense, women's reproductive privacy.¹¹ Can women's reproductive privacy be reconciled with feminine and communitarian values? The policies this book advances in the name of individual privacy and equality are more than a little consistent with compelling schemes of caretaking and affiliation.¹²

7. *Id.* at 15.

8. *Id.* at 17.

9. See C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

10. *REPRODUCTIVE LAWS*, *supra* note 1, at 10.

11. Cf. Allen, *Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 463-6 (1987) (explaining the sense in which reproductive liberty and autonomy is a form of privacy).

12. See A. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 75 (1988) (rejecting view that privacy is antithetical to women's values).

II. The Policy Perspectives

A. Poor, Minority and Disabled Women

Background essays by Laurie Nsiah-Jefferson and Adrienne Asch consider the implications of reproductive policy for poor women, women of color, and women with physical or mental disabilities. Nsiah-Jefferson begins "Reproductive Laws, Women of Color, and Low Income Women," warning that there is a lack of precise data on the reproductive status of individual groups of non-white women. However, she subsequently marshalls a battalion of useful facts, many of which are not widely known. Asch's more philosophical essay, "Reproductive Technology and Disability," is an arresting challenge to conventional attitudes about disability, and is supplemented by an extensive bibliography of social science and legal materials.

As discussed below, two of Asch's policy recommendations on behalf of the disabled — the deemphasis of prenatal screening and promotion of surrogate parenting — are in direct opposition to policy recommendations made by Nsiah-Jefferson on behalf of poor and ethnic minority women. Several conclusions, some obvious, should be drawn from the observation of conflicting policy preferences between disabled and ethnic minority feminists. To start, feminists will not always agree about what policies are most consistent with achieving privacy and equality. Moreover, feminists who are members of one disadvantaged group will not always agree with feminists who are members of another about optimal policy. Thus, middle-class white feminists who seek to incorporate the policy preferences of poor, minority and disabled women into their own policy proposals, must understand the nature of that aspiration.

The aspiration is not, because it cannot be, to listen to other groups and then to make policy proposals that represent the combined uncompromised policy preferences of all groups. Formulating egalitarian feminist policy proposals is not an additive process — adding "diversity" policy preferences onto a list of "majority" policy preferences. Rather, it is an ethical and political process in which cooperating advocates must be prepared to defend conceptions of which and whose interests are most pressing, and which and whose interests ought to be subject to greatest compromise. The aspiration of middle-class white feminists who seek minority perspectives must therefore be to engage other groups in inherently ethical and political exchanges.

Perhaps this is why I found it unsettling that the articles by Asch and Nsiah-Jefferson were separately commissioned as "background es-

says." The "background essay" treatment seems to presuppose that the policy perspectives of ethnic minority and disabled women are merely factual, or worse, merely expressive and therefore not open to dispute. This misimpression was furthered by the publication of the "background essays" without the critical commentary that followed each "position paper."

1. Poor Women and Women of Color

Reproductive rights have been won under the legal banner of constitutional "privacy" and the activist banner of "choice." Yet, as Nsiah-Jefferson explains, when compared to middle-class white women, women of color and poor women have had little meaningful decisional privacy and many fewer meaningful choices. Moreover, black, hispanic and asian/pacific women have not always had access to the organized pro-choice movement. Nsiah-Jefferson concludes that to create the possibility of meaningful reproductive choice, poor and minority women will require greater access to health services and information about them, a greater ability to give informed consent or informed refusal, access to financial resources, and, an end to discrimination on the basis of race and class.¹³

According to Nsiah-Jefferson, in a number of areas, the respects in which the experiences of white and non-white women differ has not been adequately recognized in the formulation of public policy. Infertility and sterility is one such area. Studies show that black women have a substantially higher incidence of infertility and sterility than white women. Sterility caused by untreated pelvic inflammatory disease, sexually transmitted disease, and surgical abuses has been a major health and social problem for black women. Some physicians have reportedly sterilized black women as a routine incident to obstetrical services without first obtaining informed consent.

Because of the high rate of female infertility and sterility in the black community, Nsiah-Jefferson argued, new reproductive technologies should be widely available and non-traditional conceptions of the family embraced. In making this argument, she was fully mindful of the economic and ethical difficulties. Without public funding, the group of women whose need for new technology-based infertility and sterility services is greatest is least able to afford them. Moreover, at least one of the alternative methods of reproduction under discussion today, sur-

13. REPRODUCTIVE LAWS, *supra* note 1, at 24.

rogate motherhood, is of doubtful justice. It threatens to commercialize the wombs of poor women.

Just as the unavailability of infertility and sterility services would have great negative impact on women of color, so too would criminalization of second- and third-trimester abortions. Because public abortion funding is not available in many states, poor and minority women delay abortions until they can save or raise money to pay for them. Moreover, the teenage pregnancy rates among blacks is high and studies show that teenagers are slower than their adult counterparts to discover and grapple with their pregnancies.

Nsiah-Jefferson reported that the problem of reproductive hazards in the workplace has a particularly strong adverse impact on poor women and women of color. Many of these women are employed at low paying jobs where the risk of exposure to reproductive and other health hazards is most severe, for example in the health, textile, laundry and cleaning industries. Legislation designed to require that employers make workplaces safe for all workers would thus be of particular benefit to poor women and women of color. So too would policies assuring confidentiality in HIV antibody testing for the AIDS virus. Women of color are represented in disproportionately high numbers among women infected with the AIDS virus. So that they can make timely health decisions concerning partners, off-spring, and themselves, women of color should be encouraged to obtain tests. The promise of confidentiality would help to ensure that women for whom the risk of infection is statistically highest are not afraid to be tested out of concern for their livelihoods and relationships.

On a different score, Nsiah-Jefferson argues that there should be public funding for prenatal screening and genetic counseling so that poor and minority women, like middle-class whites, are able to obtain and take advantage of information about any abnormalities in potential off-spring. Genetic counseling, she urges, should be conducted in a way that crosses the inevitable communication barriers between experts and their less affluent and educated patients.¹⁴ These equality arguments for increased access to prenatal screening and counseling are persuasive, but they are in tension with Adrienne Asch's argument that women of all races and classes should deemphasize prenatal screening to promote the equality of disabled people.

14. *Id.* at 32-34.

2. Women with Disabilities

Adrienne Asch's background essay is about two rather different things. It is about whether people with disabilities should be parents, to which Asch answers a resounding "yes." It is also about whether efforts should be made through prenatal screening to "weed out" disabled children. To this, Asch's firm, but controversial answer is "no." Asch's view is that pregnant women should not, as a matter of course, abort fetuses destined for disability. (She makes an exception for cases so severe that lives are bound to be very short and painful.) Moreover, Asch believes parents should not be reproved for bringing disabled children into the world. Her central message brings together concerns about parenting the disabled and disabled parents: disabled people are people too. They should be given a chance to enjoy life to the fullest extent possible, which includes growing up to have families of their own.

Asch makes a strong case. She starts by emphasizing that, although disability is perceived as abnormal, it is more "normal" than many might suppose. A full fifteen percent of the population is disabled. (Asch defines disability broadly to include such diverse conditions as paraplegia, blindness, deafness, mental retardation, and a history of psychiatric disorder.) Five percent of women of reproductive age have disabilities that biologically or socially constrain their reproductive choices.

Asch proposes a shift in attitude away from what she calls the "medical model" of disability to the "minority group model." Disability, which she describes as "socially constructed," is too often viewed as sickness, giving rise to paternalistic objections to parenting. Because disability is a socially constructed category, those suffering with disabilities should be viewed as a kind of "suspect class," that is, as persons likely to be wrongfully discriminated against on arbitrary grounds. The medical model of disability supports presumptions of parental incompetence. On the other hand, the minority group model eschews the incompetence presumption as *prima facie* discrimination, and asks those who would constrain the parenting choice of the disabled to exercise the greatest scrutiny and come forward with compelling reasons. In making this proposal, Asch seems mainly concerned with changing how society thinks about disability. So, for example, she does not recommend changing the law so that parents could no longer choose to abort fetuses suspected of disability. She admits there may be valid reasons for individual women and families to end a pregnancy on account of fetal disability.

Asch thoughtfully explores the nature of parental dreams for their

children and suggests that we should view disability in the same light that we view other problems our children face, problems of which we are tolerant. She writes that:

The argument that a woman's only realistic decision is to abort a fetus with a disability until society is more willing to include disabled people is at first powerful, persuasive, and mindful of the toll disability takes on families. It loses some force, however, when we consider that women of color bring children into the world even knowing that their children will grow up in a racist society and may suffer . . . as a result.¹⁵

This is an intriguing, but ineffective, analogy.

The collective alternative of black parents to bringing black children into the world is genocide. Expectant mothers of black children can expect that their children will have every endowment of body and mind human beings can have to cope with hostility. This is not the expectation of mothers of disabled children, whether black, brown, red, yellow or white. Disabled children are perceived as having to cope with the limitations of their own bodies or minds, as well as a hostile world. Aborting children because of their race is virtually diabolical; aborting children because of disability or illness is something compassionate expectant mothers of any race may contemplate. It does not help Asch's effort to persuade readers that the disabled are equally deserving of life to suggest that disabled children are anticipated by their parents in precisely the same way that children of color are anticipated by theirs.

Asch is ambivalent about new reproductive technologies. She views prenatal screening for disability diagnosis as a powerfully symbolic rejection of disabled people. Asch believes it is self-deceptive to abort the disabled "for their own good," and immoral to abort because of the costs that care of the disabled imposes upon society. As noted, Asch's opposition to prenatal screening and genetic counseling premised on the need to abort the disabled is in tension with Laurie Nsiah-Jefferson's call for greater access to and public funding of prenatal screening and genetic counseling for women of color.

Asch's views on surrogate parenting also pull in an opposite direction. Asch praises surrogate parenting as a potentially valuable service that should be available to disabled women who would like to have biologically related children but who cannot manage sexual intercourse

15. *Id.* at 85-86.

or the stress of pregnancy and childbirth. In theory, the infertility and sterility problems of black women make them candidates for surrogacy services as well. But, Nsiah-Jefferson and others fear mounting the slippery slope toward new, exploitive uses of poor and minority women.

Asch's precise stance on nonconsensual pregnancy intervention on behalf of the unborn cannot be gleaned from her general remarks on the subject. However, unlike other feminist contributors to this book, it appears that Asch would support a policy under which the autonomy of pregnant women could be sacrificed to prevent or treat a disability that could not be effectively treated postnatally. Asch is in accord with the others, however, on the question of the legitimacy of "wrongful birth" and "wrongful life" tort actions. She argues that there is good reason both to fear wrongful birth suits brought against health care providers and to oppose suits for wrongful life brought against parents. Both send disabled children a message that their existence is something to be deeply sorry about. In addition, wrongful life actions penalize parents for the noble act of parenting disabled children.

B. Late-term Abortion

Nan D. Hunter's "Time Limits on Abortion" reviews abortion law since *Roe v. Wade*.¹⁶ Under *Roe*, a woman's choice to a medically safe abortion is constitutionally protected. In the first trimester of pregnancy, her private decision to abort is not subject to state prohibition or constraint. In the second trimester, states may limit abortion choice for reasons of maternal health. In the third trimester of pregnancy, states may interfere with abortion choice to protect the life of a "viable" fetus.¹⁷ Hunter argues that viability, now placed at between 24 and 28 weeks of pregnancy, is an unstable, vague concept.¹⁸ She joins many others who view viability as a medically, morally or logically inadequate basis for time limits on abortion.

Hunter favors abandoning the viability standard. Despite "policy tensions inherent in late abortion," relating to the personhood status of

16. 410 U.S. 113 (1973).

17. *Id.* at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point . . . is at . . . the end of the first trimester . . . With respect to the State's important and legitimate interests in potential life, the 'compelling' point is at viability.").

18. Cf. Grimes, *Second-Trimester Abortion in the United States*, 16 FAM. PLAN. PERSP. 260, 264 (1984) (date at which fetus likely to survive inexact).

the fetus, Hunter supports an unlimited abortion right for all women.¹⁹ Utilizing legal case analysis, she argues that the abortion privacy doctrine relied on by the Supreme Court is based on principles of both bodily integrity and personal autonomy. It is an "awesome degradation of the self" she concludes, to force parenthood on a person against her will.²⁰ The better policy is one currently followed in the majority of states that decline to regulate post-viability abortions.

In that spirit, Hunter proposed an unlimited abortion right statute, providing that "[t]he state shall not compel any woman to complete or to terminate a pregnancy, nor shall the state restrict the use of medically appropriate methods of abortions."²¹ Hunter predicted that such a statute would not increase the number of late-term abortions, which are in any case uncommon and generally sought for very good reasons. She argued that the policy goal of reducing late-term abortion could be achieved more humanely by alteration of the social conditions that give rise to them, than by blanket prohibition.²²

Hunter's perspective that the viability criterion is unstable, and that an unlimited abortion right is a better alternative, will be applauded in some quarters. However, her response to the question of the appropriate level of concern for the fetus is unsatisfying. She appears to side-step familiar fetus-as-person and fetus-as-patient arguments like those raised by her critics in this volume. Hunter's general response was vague: "The question of how the law should treat post-viability abortions requires a balancing of harms, interests, and other options."²³ More specifically, but somewhat mysteriously, she concluded that the potential lives of the unborn can be "valued in many ways" and that "[t]o compel procreation is more punitive than respectful of the generative process."²⁴

C. Prenatal Screening

In their position paper, "Prenatal Screening," Mary Sue Henifin, Ruth Hubbard and Judy Norsigian presented an overview of legal constraints on prenatal screening. They concluded that, although standard

19. REPRODUCTIVE LAWS, *supra* note 1, at 146.

20. *Id.* at 145.

21. *Id.* at 148.

22. *Id.* at 147.

23. *Id.* at 147.

24. *Id.* at 147.

prenatal tests and counselling should be available to all women who want them irrespective of their ability to pay, mandatory testing is countermanded by constitutional privacy rights and common law rights to bodily integrity. The authors rejected the conception of pregnant women that singles them out and places them in a special category enabling justified state control of their bodies or fetuses.

The availability of prenatal screening raised the specter of liability for "genetic" injury. Notwithstanding women's legal rights of choice, is there a legal duty to screen and abort, or to pay civil damages in wrongful life actions brought by their own disabled offspring? These authors viewed cases allowing children to recover for prenatal injury as dangerous precedents, grounded in the assumption that women's role is that of "fetal container."²⁵ Asch opposed suits of this type as well, but primarily in the name of respect for the worth of disabled persons rather than women's rights of private choice and bodily integrity.

To stem the tide of maternal liability for genetic injury (and prenatal injury resulting from activities that posed health risks to the fetus), the authors proposed a parental immunity statute, immunizing parents from law suits for conduct during pregnancy. The proposed statute was designed to free women from the fear of liability for refusal to undergo screening or to take action in reliance upon it.

Jeannie I. Rosoff's commentary affirmed the thrust of Henifin, Hubbard and Norsigian's position paper. Rosoff added caveats against utilitarian trade-offs of fundamental rights in reproductive policy. If prenatal screening is good maternal care, it should be sought for that reason, not because it would set-off other costs.²⁶ Deborah Kaplan's commentary stressed that disabled people must be brought into the prenatal screening debate. She asked how it is possible to "talk about or take advantage of prenatal screening without further stigmatizing disabled people."²⁷ Arguing from the point of view of a personal injury lawyer who has become critical of wrongful life actions, she contended, along the lines of Asch, that these suits further the stereotype that the lives of disabled persons are hopeless.

25. *Id.* at 173.

26. *Id.* at 240.

27. *Id.* at 245.

D. Fetus as Person

Janet Gallagher's position paper surveys legal cases and social attitudes about the personhood status of the fetus. She seeks to discredit the notion that women's autonomy should be sacrificed for fetal well-being. The treatment of women as vessels, and fetuses as persons and patients, reflects society's elevation of the fetus as a "symbol of hope and fear."²⁸ Gallagher's seemingly exhaustive paper is supplemented with model jury instructions and a detailed legal case commentary appendix.

According to Gallagher, legal cases and proposals upholding "fetal rights fly in the face of what has become a very consistent, powerful trend in American law," namely, "protection for individual rights of personal autonomy and bodily integrity, especially in the area of medical decision making."²⁹ She attacks those intent upon making women and physicians liable in criminal and tort law for fetal injury. Liability is wrongheaded for a number of reasons. First, pregnant women rarely refuse beneficial medical treatment. Second, in the face of medical uncertainty, women are being subjected to too many caesarian section deliveries. Caesareans allow physicians who fear liability for injuries sustained by the infant during vaginal birth to exercise greater control over delivery. Gallagher believes women should have a right to carry and bear their children "with dignity," on their own terms.³⁰ Third, while it is unfortunate that children are born with disabilities, courts should be reluctant to hold liable for "prenatal abuse" women to whom society does not guarantee medical and prenatal care.

In his commentary, neonatologist and pediatrician Alan R. Fleischman argues that "The Fetus is a Patient." He takes exception to views Gallagher and Hunter defend in their respective papers on fetal personhood and late-term abortion. Fleishman attempts systematic argumentation from the moral principles of "respect for person" and "beneficence." Constrained by the short-comment format, his effort is heavy-handed and unconvincing.³¹

Fleischman too quickly concludes that respect for persons "clearly" supports the right of expectant mothers to determine what happens to their own bodies and that it less clearly supports the poten-

28. *Id.* at 188, 191.

29. *Id.* at 196-97.

30. *Id.* at 215.

31. *Id.* at 249-50.

tial autonomy of the fetus.³² Yet, moral reasoning in reliance upon broadly drawn principles in controversial cases does not yield such determinate results.

Fleischman's principle of beneficence allegedly requires that a physician do what he or she can to maximize possible benefits and minimize possible harms. According to Fleischman the beneficence principle requires the ethical physician to balance mothers' and fetuses' interests to secure their well-being and best interests.³³ This conclusion and the manner in which it is reached is puzzling. First, Fleischman does not explain the jarring juxtaposition of a respect-for-persons deontological morality with the consequentialist interest-maximizing morality his approach to reproductive ethics purports to incorporate. Second, he does not specify what counts as benefits and harms, their relative weight, or the sense in which the unborn have interests to be harmed or benefited. Third, even assuming that morality requires balancing maternal and fetal interests in the name of beneficence, it may be that pregnant women, and not their physicians, have the moral power to effectuate their understanding of what balancing requires.

Fleischman seems to rely on his beneficence principle to argue that a woman has a moral obligation to act in the best interest of her fetus to the extent she has voluntarily allowed it to come to term. The facial appeal of this point is easily resisted. Of course, women have a moral obligation to do the morally best thing. Sometimes that will mean carrying a pregnancy to term. It cannot be decided in advance that the best thing will always be to focus on preserving the life of a fetus rather than securing the conditions of full, happy lives for herself, her family and her community.

Fleischman's moral perspectives are shared in large part by John A. Robertson in his commentary, "Reconciling Offspring and Maternal Interest During Pregnancy." Robertson is disturbed by the view of the position paper authors that "neither a late stage of pregnancy nor a decision to go to term justifies limits on the autonomy of pregnant women."³⁴ Robertson's stance is that a mother's interest in autonomy must be balanced against her baby's welfare. Unlike that of feminists who turn to "balancing," his application of the balancing test comes down on the side of greater protection for the fetus.

Robertson believes women should be regarded as having a moral

32. *Id.* at 250.

33. *Id.* at 250.

34. *Id.* at 259.

duty to babies they choose to bring to term requiring that they, for example, take scrupulous care of their own health. Robertson's duty would leave a woman free to abort. But if she does not, her fetus is a patient by virtue of the expectation that it will be born alive.³⁵ In addition to being a patient, the fetus is also a legal person. Offspring have a welfare interest that is properly also a *legal* interest in being born healthy. For this reason, Robertson maintains, women should be legally accountable for voluntary conduct leading to prenatal injury to their children. As a practical matter, women should not be subjected to prosecution or "seized" during pregnancy.³⁶ He argued that Gallagher and Henifin, Hubbard and Norsigian presented no empirical data or persuasive reasons for thinking that prenatal child abuse laws would *unjustly* limit the conduct of pregnant women or others to whom they would apply.

In a further defense of fetal personhood, Robertson suggests that legal bans on late-term abortions are justifiable. Early abortion, performed before the brain and nervous system have largely taken shape and *ex utero* fetal survival would be possible, is morally less problematic than late-term abortion. He explains that the advanced physiological development of the fetus at 22 to 24 weeks corresponds to increased moral demands on us.³⁷ As a moral matter, Robertson urges intervention that lets mature fetuses live on the ground that whatever interests pregnant women have in the avoidance of genetic and gestational parentage are overridden by needs of the infant.

E. Workplace Hazards

The important issues set out by Joan E. Bertin's position paper, "Reproductive Hazards in the Workplace," will be unfamiliar to many readers, even readers who know quite a lot about reproductive ethics and law. Bertin argues that many American workplaces pose hazards to men, women, and the unborn. Where hazards are recognized or suspected, management response has been to bar women of childbearing age and pregnant women from the workplace, wholesale. As a consequence, hundreds and thousands of jobs are closed to women.³⁸

Bertin maintains that employers have often ignored reproductive

35. *Id.* at 260.

36. *Id.* at 264-65.

37. *Id.* at 268.

38. *Id.* at 279.

hazards men face, while taking the different measure of disqualifying from employment fertile women of childbearing age. Sexism in the design of occupational hazards research has allowed experts to conclude that women and fetuses are at greater risk. Epidemiological studies frequently fail to control for paternal exposures to hazards. That men's genetic material may have an impact on future generations is obvious, but men of childbearing age have not been closely studied and have not been banned from the workplace.

Economic equality for all women requires that male and female workers be provided a safe workplace and that women not be paternalistically excluded either for their own sakes or for the sake of fetuses they may carry. As Bertin observes, women are too often treated as childbearers first and workers second. Employers' fetal protection policies have forced some women to make a choice between fertility and their jobs. Women who wish to function in the "male" world have been handed surgical sterility as their best economic option, requiring literally that they sacrifice their uniquely female childbearing capacities.³⁹ Jeanne Mager Stellman's commentary emphasizing "flawed science and poor policies" in the semiconductor industry corroborates Bertin's main points.

Bertin finds nothing in Title VII of the Equal Employment Opportunity Act (Title VII)⁴⁰ or the Occupational Safety and Health Act (OSHA)⁴¹ indicating Congressional intent to offer pregnant employees less or different legal protection than nonpregnant employees. It is thus all the more important that the use of exclusionary policies or sterility requirements be prohibited. As a remedy, Bertin proposes that Congress clarify the statutory mandates of OSHA and Title VII. She suggests the creation of a private right of action under OSHA. She emphasizes the legal principle that discrimination may not be excused because of the costs associated with nondiscrimination and offers a model "workers' bill of rights," addressing the problem of reproductive hazards and employment rights.

Writing out of their staff experiences with the House Education and Labor Committee, Edmund D. Cooke and Sally J. Kenney seem convinced of the validity of Bertin's perspectives. Yet, with respect to new reproductive hazards legislation designed to protect women workers, Cooke and Kenney maintain that OSHA interest groups may not

39. *Id.* at 278.

40. 42 U.S.C. § 2000e-2000e-17 (1982).

41. 29 U.S.C. § 651-678 (1976 & Supp. III 1979).

be responsive to amending the statute. Interest groups will fear opening OSHA up to political processes that may result in other changes with unforeseen or foreseen negative consequences. Free-standing equal safety legislation, they suggest, is a better idea. As for Bertin's idea of a private right of action, Cooke and Kenney opine that it seems too expensive. They recommend instead a quasi-judicial administrative process. Cooke and Kenney note that the Equal Employment Opportunity Commission has been sluggish on the reproductive hazards and discrimination issue. As practical advice, Cooke and Kenney offer the names of members of Congress to whose attention Bertin's proposals should be brought. They also offer the general strategy that interest groups be apprised as soon as possible of her proposals. Helen Rodriguez-Trias, who believes the reforms Bertin proposes are sensible and feasible, argues that "without forceful trade union involvement and pressure" innovative reform is unlikely.

F. Interference with Decisional Privacy

In her position paper, "Interference with Reproductive Choice," Nancy Gertner covers familiar territory. She argues that "maximizing control over reproductive decisions is a prerequisite to full equality for women."⁴² Gertner's list of obstacles to reproductive choice includes poverty, lack of information, and manipulative state action. The Hyde Amendment, which eliminated Medicaid coverage of elective abortions, affects the ability of poor women to terminate unwanted pregnancies. Denial of public funds to clinics that offer abortion counselling can be expected to constrain poor women's ability to choose.

Radical anti-abortion tactics such as violent attacks on facilities and bogus clinics limit reproductive choices. In a different vein, wife beating, assault on pregnant women, and intentional feticide undercut women's choices. Unwanted sterilization, especially the disproportionate sterilization of women of color, limits choice. Poverty and lack of information blocks access to new technology designed to cope with infertility. Court-ordered obstetrical interferences for refusal to take medical advice also limits reproductive choice. Last, but not least, Gertner argues that even the centerpiece of litigation concerned with abortion and procreative rights — the constitutional right to privacy — is under considerable attack. She proposes adoption of a comprehensive reproductive choice statute, establishing the principle of broad state

42. REPRODUCTIVE LAWS, *supra* note 1, at 307.

support for reproductive liberty for women.

Cooke and Kenney were especially critical of Gertner's proposal "because the legislative solutions it suggests are complex, and skirt or tread on extremely controversial issues."⁴³ They warn that neither the public nor Congress deal with such matters very well. Thus while admitting that the substance of Gertner's proposed reproductive choice statute is "validly based and necessary"⁴⁴ they conclude that real world constraints doom her proposal. It would be perceived and debated as an abortion bill, irrespective of its broader intent.

Helen Rodriguez-Trias' comments on Gertner's position paper emphasized her concern with measures to curb sterilization abuse, a problem of disproportionate impact on black and hispanic women. She praises Gertner's broad understanding of barriers to choice, but criticizes her proposal for failing to cover the issues of sterilization abuse and for failing to elevate prenatal care to the level of a right.

G. Alternative Forms of Reproduction

1. New Reproductive Techniques

In "Alternative Modes of Reproduction," Lori B. Andrews observes that "the feminist perspective" has received little attention in the growing ethical and legal literature on new and newly applied reproductive technologies.⁴⁵ These technologies include, (1) artificial insemination, (2) in vitro fertilization, (3) sperm, egg, gamete and embryo donation, and (4) surrogate parenting.

Andrews' position paper purports to identify the values feminists believe must be promoted and protected in the development of laws respecting the new reproductive alternatives. These values, she says, "ring loud and clear," even where feminists disagree about whether and how "these values are threatened by certain applications of alternative reproduction."⁴⁶

But the sound of consensus feminist values is never really heard in Andrews' paper. As commentator Peggy Davis points out, Andrews overstates her claim to have identified consensus feminist perspectives. Andrews' paper identifies her own feminist attitudes and preferences,

43. *Id.* at 332.

44. *Id.* at 333.

45. *Id.* at 361.

46. *Id.* at 362.

but not feminist values generally. A charitable reader will infer that, while Andrews does not present a distinct, consensus feminist viewpoint, the policies she favors appear to be plausible from the point of view of defensible conceptions of women's moral and political equality, bodily integrity and privacy.

According to Andrews, feminists believe infertility should be approached as a social phenomenon and not merely a biological one.⁴⁷ That is, policy-makers should seek to determine the causes of widespread infertility and eliminate them. Reducing infertility would reduce the need for expensive and controversial alternative modes of reproduction. Andrews maintains that feminists believe fertile and infertile women should have control over their bodies, their gametes and their conceptuses; that women not be exploited by their partners, their health care providers, and researchers; that alternative reproduction be available to traditional and nontraditional family arrangements, and without invasive parental screening of the sort that precedes adoption; that reproductive technology not be needlessly medicalized; and, that public and private institutions give financial support to those unable to afford alternative reproductive technologies so that every woman can realize her birth right to reproduce. According to Andrews, feminists also agree that women have a right not to be exploited by physicians, researchers, infertile couples, husbands or lovers. Reproductive materials and their handling should be within women's control. Medical treatment should be preceded by informed consent, which includes disclosures of information about known medical risks.

From the tenet that women have a right to control their bodies, Andrews inferred that women have a right to reproduce or not as they choose. Moreover, they have a right to a society that addresses the social problems of infertility, infant death and child care; to the use of in vitro fertilization; to control the fates of embryos created in vitro; to become surrogate mothers voluntarily, especially if money does not change hands and autonomy is preserved during conception and pregnancy; and to rely upon a surrogate mother to obtain a child.

For Andrews, the notion that giving birth is a birthright is clearly more than a slogan. She argues, in effect, that the right to give birth is not simply a negative right barring state interference with private choices to reproduce and parent. It is also a positive right to the social and economic requirements of reproducing even in the face of infertil-

47. *Id.* at 363.

ity and a partner's sterility. Thus, not only may the state not interfere with the choice to give birth by, for example, imposing involuntary sterilization. It must provide the social conditions that foster fertility and infant survival rather than infertility and infant mortality. It must provide the poor and middle classes with economic access to alternative reproductive technologies.

Regrettably, Andrews takes the social issues raised by alternative modes of reproduction only so far. Alternative modes of reproduction do not exist simply because infertility exists. Alternative modes of reproduction exist because people want — and are willing to pay large sums of money to have — a certain biological and racial relationship to the children they raise. They want to have contributed genetic materials, or failing that, to have selected their child's biological parentage or gestator. Adoption, an old fashioned solution, would be more popular if more healthy white babies were available and/or if racial differences and disability could be more easily accepted by adoptive parents and adoption professionals.

One of Andrews' more debatable conclusions is that there ought to be no screening requirements for people who want to take advantage of sperm banks and *in vitro* fertilization. Interestingly, she supports a reasonable degree of screening of adoptive parents and persons who aid in reproduction, such as surrogate mothers and sperm donors. In this connection, she attempted to distinguish adoption screening from screening in other contexts:

In adoption, there is no biological tie between the child and any of the prospective parents. Thus, the screening becomes a substitute for the biological bond in determining who should be allowed to parent a child. In contrast, with alternative reproduction [e.g., *in vitro* fertilization, artificial insemination, and surrogate motherhood], there is a biological tie between one or both of the prospective parents and the child. Traditionally, society has considered that biological tie to be a sufficient indicator of parental merit to let a person reproduce and rear a child without prior constraint.⁴⁸

However, it is a fiction that the capacity to forge biological ties suggests parental merit, whereas the desire to create legal and moral ties to a child does not. A better account is rooted in society's traditional allocation of rights of privacy shielding reproductive acts and home life

48. *Id.* at 375.

from governmental scrutiny, until acts which threaten a child's best interests become known or reasonably suspected.

In response to Andrews' proposal that simple new technologies, like artificial insemination be demedicalized for lay use, physician Luigi Mastroianni questioned whether risks created by exclusion of a role for doctors in alternative reproductive technologies are worth the added autonomy. He also discussed the technical problems that arise in efforts to protect the fetus in embryo transplants. Mastroianni joined Asch, Gallagher, Robertson, and others in asking whether there should be legal liability if children are born with disabilities.

In his commentary to the position papers on alternative modes of reproduction, George Annas begins with the assumption that government has a greater role to play in the use of new reproductive technologies than in abortion and contraception. He suggests that policy-makers examine new reproductive technologies with a view toward identifying their common characteristics relevant to public policy. Tomorrow's inevitable new technologies can then be analyzed under today's framework. He offers a clever analytic procedure whereby policy-makers would quantify the relative social utility of regulating each method of new reproductive technology and its generic importance as a social policy issue. He admits that the assignments of numerical weights in the analysis is impressionistic, but nevertheless maintains its usefulness in assessing the worth of regulation relevant to "controlling medical practice; controlling human experimentation; granting legal protection to the extracorporeal embryo; making provisions for donor screening and record confidentiality; regulating commerce in gamete and embryos; and attaching conditions to the delivery of medical services that are paid for by government programs."⁴⁹

Annas reports that at the present time there is no federal regulation in these areas, but there is a great deal of state legislation. In the course of his survey of actual and ideal legislation, Annas made a number of specific policy proposals. Interestingly, he proposed that states should enact statutes that define a child's gestational mother as its mother. (In anticipation of the day when machines may be gestational mothers, Annas may need to consider whether women who provide biologic materials should be legally defined as mothers in the absence of a human gestator.) On another score, Annas believes Congress should amend the National Organ Transplant Act to include human embryos

49. *Id.* at 413.

among items it is unlawful to sell.

2. Surrogate Parenting

Wendy Chavkin, Barbara Katz Rothman and Rayna Rapp offer a brief position paper specifically about surrogate motherhood. For reasons they do not explain, their paper is set up as a series of questions and answers. The answers they give to the questions they pose reflect a sense that "diverse women's interests in pregnancies" are threatened by third-party reproduction.⁵⁰

They are thus more skeptical about policies promoting surrogacy than Andrews or Asch. They share the fears of Nsiah-Jefferson and Annas about letting the camel's nose under the tent. Like Annas, they reject the suggestion of some feminists, including Andrews in this volume,⁵¹ that surrogacy contracts should be specifically enforced to avoid the assumption that women are fickle.⁵² This seems correct. There are many good reasons a surrogate might change her mind about so momentous a matter as giving up a child she has carried pursuant to a prenatal agreement. Moreover, legal battles over surrogacy agreements must resolve, at the threshold, whether such agreements should be treated as specifically enforceable commercial contracts at all, or as unenforceable personal commitments.⁵³

Peggy Davis argued in commentary that surrogate parenting should be permitted to avoid the stagnation of gender roles and definition. Her idea is that having children should not be limited to the marital and traditional family context, but be permitted in the commercial context as well. Yet, surrogacy is not progressive in the way Davis suggests. Viewed in one light, surrogacy arrangements are not a sharp break with tradition. They still involve women having babies to satisfy men's or couple's craving for biological descendants. Moreover, there is a frank retrogressive overtone of slavery in the idea of creating commercial markets in children that disrecommends surrogacy as a route to female liberation.

Even if surrogate parenting has a future as commercialized childbearing, from the point of view of surrogates themselves, the practice has not yet become that. Surrogate Elizabeth Kane has revealed

50. *Id.* at 405.

51. *Id.* at 369.

52. *Id.* at 414.

53. See generally Allen, *Privacy, Surrogacy and the Baby M Case*, 76 GEO. L.J. 1759 (1988).

that she lost rather than earned money as America's first commercial surrogate mother.⁵⁴ Jan Sutton, a leading surrogacy advocate, has explained that compassion for the plight of childless relatives and friends, rather than the nominal sums she earned, motivated her twice to become a surrogate mother for strangers.⁵⁵ Moreover, Sutton is more satisfied with her second surrogacy experience than the first because a continuing friendship with the biological father and adoptive mother has enabled her to spend time with her child. There is no inherent redefinition of *gender* roles in a practice that permits low-paid, nurturing women like Kane and Sutton to bear children fathered by men to whom they are not married.

Davis' warning to policy-makers that they keep law and morality distinct has unclear implications for surrogacy. Davis asserted that law and morality are potentially confused in policy discussions about the new reproductive technologies. She urged that policy-makers preserve the distinction between what is private (properly left to individual morality) and what is public (properly subject to legal regulation or prohibition).

Davis believes that how society confronts new technologies and alternative methods of reproduction — like surrogacy — should be guided by the principle that government should not interfere with genuinely private choices. She seems to reject Annas' assumption that more state intervention is necessarily required by use of new reproductive technologies than is required by the use of contraception and abortion. The difficulty, of course, is in defending the policy treatment of reproductive methods which have social and third-party consequences as private matters to be left to private decisionmaking and private law, rather than as public concerns, properly subject to public regulation through public law.

Conclusion

This book of diverse perspectives is unified by the underlying theme of sexual equality through reproductive privacy and social equality. Reproductive law in its current form satisfies no one's ideal. Willy nilly, this book shows that the labels "feminist," "liberal," and "egali-

54. Surrogate mothers Elizabeth Kane and Jan Sutton were featured speakers at the Legal Issues Workshop of the American Federation of Planned Parenthood, Annual Convention, October 14, 1988, St. Louis, Missouri.

55. *Id.*

tarian" do not signify consensus on the details of reproductive policy. Still, for the major contributors to this volume there are common policy imperatives, starting with a national health plan that guarantees routine medical and prenatal care for all women, workplaces free of reproductive hazards, abortion access, and parental immunity from liability for "prenatal abuse" and "wrongful life."

This is not a perfect book. First, while useful, not all of the position papers are as original and provocative as Asch's paper on the reproductive rights of the disabled or Gallagher's on fetal personhood. Second, the quality of the commentary is uneven. A more tightly edited book would have eliminated repetitive and *pro forma* commentary. Third, as my criticisms of Fleischman and Annas suggest, the systematic ethical policy analysis in the book is sketchy, heavy-handed and unpersuasive. Finally, incomplete attention is given to problems of policy implementation and strategies for preserving past legislative and judicial gains. The stark, if disheartening, policy realism of the book's treatment of proposed legislation to address the problem of reproductive hazards in the workplace would have been helpful throughout.

Reproductive Laws for the 1990s is not perfect, but its flaws barely diminish its practical value for intended audiences. The book compiles the thoughts and research of a distinguished group of reproductive policy experts. It conveys a wealth of information about reproductive law in the United States and the factors that shape it. Insisting that reproductive policy should not be formulated in ignorance of social reality, the book spotlights the implications of reproductive policy on the lives of poor, minority and disabled women. Best of all, the book provides readers with an organized overview of reproductive law. This perspective is not easily obtained, for high-profile issues such as surrogate parenthood and abortion often overshadow basic long-term reproductive policy concerns.